No 04-885

Supreme Court, U.S.
FILED
AUG 22 2005
OFFICE OF THE CLERK

In The
Supreme Court of the United States

CENTRAL VIRGINIA COMMUNITY COLLEGE, *ET AL.*,

Petitioners,

v.

BERNARD KATZ, LIQUIDATING SUPERVISOR FOR WALLACE'S BOOKSTORES, INC.,

Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF FOR THE NATIONAL ASSOCIATION OF BANKRUPTCY TRUSTEES *AMICUS CURIAE*, IN SUPPORT OF THE RESPONDENT

FILED BY CONSENT OF PARTIES

Martin P. Sheehan
Counsel of Record
41 Fifteenth Street
Wheeling, West Virginia 26003
(304) 232-1064

Counsel for Amicus Curiae
National Association of Bankruptcy Trustees

THE LEX GROUP • 1108 East Main Street • Suite 1400 • Richmond, VA 23219
(804) 644-4419 • (800) 856-4419 • Fax: (804) 644-3660 • www.thelexgroup.com

CONSENT TO FILING OF BRIEF

The petitioners and respondent filed blanket consents to the filing of amicus briefs.

QUESTION PRESENTED

Does Congress have authority to abrogate state sovereign immunity under the Bankruptcy Clause of the United States Constitution, Article I, Section 8, clause 4?

PARTIES TO THE LITIGATION

Petitioners are several state supported institutions of higher learning; Central Virginia Community College, Virginia Military Institute, New River Community College, and Blue Ridge Community College.

Bernard Katz is the liquidating supervisor of Wallace's Bookstores, Inc.

TABLE OF CONTENTS

CONSENT TO FILING OF BRIEF i

QUESTION PRESENTED ii

PARTIES TO THE LITIGATION iii

TABLE OF CONTENTS iv

TABLE OF AUTHORITIES v

INTEREST OF THE AMICI CURIAE 1

OPINIONS AND ORDERS BELOW 2

STATEMENT OF JURISDICTION 2

CONSTITUTIONAL AND
STATUTORY PROVISIONS AT ISSUE 2

STATEMENT OF THE CASE 6

SUMMARY OF THE ARGUMENT 6

ARGUMENT 8

CONCLUSION 28

TABLE OF AUTHORITIES

SUPREME COURT CASES

Adair v. Bank of America National Trust and
Savings Association,
303 U.S. 350 (1938) 14

Alden v. Maine,
527 U.S. 706 (1999) 9, 10, 13, 24

Blanchette v.
Connecticut General Insurance Corps.,
419 U.S. 102 (1974) 14

Blatchford v. Native Village of Noatak,
501 U.S. 775 (1991) 24

California v. Deep Sea Research, Inc.,
523 U.S. 491 (1998) 17

Chisolm v. Georgia,
2 U.S. (2 Dall) 419 (1793) 12-13

City of New York v. Saper,
336 U.S. 328 (1949) 18, 19, 24

College Savings Bank v. Florida Prepaid Post-
Secondary Education Expense Bd.,
527 U.S. 666 (1999) 9, 10

Continental Illinois National Bank and Trust Co. v. Chicago, Rock Island and Pacific Railway, Co., 294 U.S. 648 (1935) 11, 14

Florida Prepaid Post-Secondary Education Expense Bd. v. College Savings Bank, 527 U.S. 627 (1999) 9, 10

Gardner v. New Jersey, 329 U.S. 565 (1945) 17, 19, 24

Hanover National Bank v. Moyses, 186 U.S. 181 (1902) 11, 14, 25

Hoffman v. Connecticut Department of Income Maintenance, 492 U.S. 96 (1989) 8, 27

Idaho v. Couer d'Alene Tribe of Idaho, 521 U.S. 261 (1997) 9

Kimel v. Florida Bd. of Regents, 528 U.S. 62 (2000) 9

Marshall v. New York, 254 U.S. 380 (1920) 16

New Jersey v. Anderson, 203 U.S. 483 (1906) 15, 18, 19, 24

New York v. Irving Trust Co., 288 U.S. 329 (1933) 16, 17, 18, 19

Northern Pipeline Const. Co. v. Marathon Pipe Line Co., 458 U.S. 50 (1982) 27

Perez v. Campbell, 402 U.S. 637 (1971) 18

Railway Labor Executives' Ass'n v. Gibbons, 455 U.S. 457 (1982) ..... passim

Seminole Tribe of Florida v. Florida, 517 U.S. 44 (1996) 9, 19, 27

Sturges v. Crowninshield, 12 U.S. (4 Wheat.) 122 (1819) 14

United States v. Nordic Village, Inc., 503 U.S. 30 (1992) 8

Tennessee Student Assistance Corp. v. Hood, 541 U.S. 509 (2004) 19, 25

Van Huffel v. Harkelrode, 284 U.S. 225 (1931) ..... passim

Wright v. Union Central Life Insurance Co., 304 U.S. 502 (1938) 11, 14

OTHER FEDERAL CASES

In re: Ambler, 1 F.Cas. 588 (D.C. S.D.N.Y. 1875)(No. 270) 23

In re: Greenville & C.R. Co.,
10 F.Cas.1180 (D.C. S.C. 1872)(No. 5,787) 15

McVey Trucking, Inc. v.
Sec'y of State of Illinois
(In re: McVey Trucking, Inc.),
812 F.2d 311, 328 (1987) 26

Parsons v. Greenville & C.R. Co.,
18 F.Cas. 1255 (C.C.A. E.D. S.C. 1877)
(No. 10,776) 15

In re: 245 Associates, L.L.C.,
188 B.R. 743 (Bankr. S.D. N.Y. 1995) 17

CONSTITUTIONAL PROVISIONS

U.S. Const. amend. XI ..... passim

U.S. Const. art. I, § 8, cl. 4,
The Bankruptcy Clause ..... passim

U.S. Const. art. I, § 10,
The Contract Clause 6, 10, 22

Commerce Clause 10, 27

Naturalization Clause 22

Patent Clause 10

STATUTES AND REGULATIONS

11 U.S.C. § 106 ..... 3, 8

11 U.S.C. § 106(a) 8

11 U.S.C. § 507(a)(3) 25

11 U.S.C. § 507(a)(5) 25

11 U.S.C. § 507(a)(8) 19, 25

11 U.S.C. § 523 ..... 3, 19

11 U.S.C. § 523(a)(8) 25

11 U.S.C. § 543 17

11 U.S.C. § 541 3

11 U.S.C. § 547(b) 3, 25

11 U.S.C. § 550(a) 5

11 U.S.C. § 727(a) and (b) 19

11 U.S.C. § 1322(a)(2) 19

11 U.S.C. § 1328 19

28 U.S.C. § 157(b)(2)(3) and (4) 27

28 U.S.C. § 586(a)(1) 1

28 U.S.C. § 1254(1) 2

Bankruptcy Rule of Procedure 7008(a) 27

Pub. L. No. 103-394, Sect. 113, 108 Stat. 4106 (1994) 8-9

Act of April 4, 1800, Ch. XIX, 2 Stat. 19 (1800),
repealed by Act of Dec. 19,
1803 Ch. 6, 2 Stat. 248 23

Section 5 of the Act, Ch. IX, 5 Stat. 440,
repealed by Act of March 3, 1843,
Ch. 82 5 Stat. 614 23

Section 27 of the Act of March 2 1867,
Ch. 176, 14 Stat. 517,
repealed by Act of June 7, 1878,
Ch. 160, 20 Stat. 99 23

MISCELLANEOUS

The Federalist No. 32 ..... 19, 22, 24

The Federalist No. 81 24

Black, H.C.,
A Treatise on the Law and Practice of Bankruptcy,
(4th Ed. Kansas City, Mo. 1926) 16

Browning, M.,
Tough Bankruptcy Issues Under the
Eleventh Amendment,
7 J. of Bankruptcy Law and Practice 219 (1998) 26

Klee, K. N., Johnston, J. O., Winston, E.,
State Defiance of Bankruptcy Law,
52 Vanderbilt L.Rev. 1527 (1999) 26

Lieb, R.,
Eleventh Amendment Immunity of a State in
Bankruptcy Cases: A New Jurisdictional Approach,
7 Am. Bank. Inst. L.Rev. 269 (1999) 26

INTEREST OF THE AMICUS CURIAE

The amicus curiae is the National Association of Bankruptcy Trustees, an organization[1] consisting of over 1000 of the Chapter 7 panel trustees, out of approximately 1220 such panel trustees. Panel trustees are appointed by the United States Trustees pursuant to 28 U.S.C. § 586(a)(1).

---

[1] No other person or entity, except for the *amicus curiae*, its members and its counsel, made a monetary contribution to the preparation and submission of this brief.

OPINIONS AND ORDERS BELOW

The Bankruptcy Court for the Eastern District of Kentucky denied petitioners' motions to dismiss an AP No. 03-5081. The District Court affirmed in an unpublished opinion on August 5, 2003. The United States Court of Appeals affirmed on August 4, 2004, in an unpublished decision.

STATEMENT OF JURISDICTION

The court of appeals entered its judgment on August 4, 2004. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(l).

CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE

I. The Bankruptcy Clause of the Constitution, U. S. Const. art. I, § 8, cl. 4, grants the following power to Congress:

> To establish an uniform rule of naturalization, and uniform laws on the subject of bankruptcies throughout the United States.

II. The Eleventh Amendments states:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

III. Bankruptcy Code, 11 U.S.C. § 106 provides in pertinent part:

> (a) Notwithstanding an assertion of sovereign immunity, sovereign immunity is aborgated as to a governmental unit to the extent set forth in this section with respect to the following:
>
> (1) Section []...547...of this title.

IV. Bankruptcy Code, 11 U.S.C. § 541 provides in pertinent part:

> (a) The commencement of a case…creates an estate. The estate is comprised of all the following property, wherever located and by whomever held: …
> …3)
> Any interest in property that the trustee recovers under section…550….

V. Bankruptcy Code , 11 U.S.C. § 547(b) provides in pertinent part:

(b) Except as provided in subsections (c) of this section, the trustee may avoid any transfer of an interest of the debtor in property –

(1) to or for the benefit of a creditor.

(2) for or on account of an antecedent debt owed by the debtor before such transfer was made;

(3) made while the debtor was solvent;

(4) made –

(A) on or within 90 days before the date of the filing of the petition; or

(B) between ninety days and one year before the date of the filing of the petition, if such creditor at the time of such transfer was an insider; and

(5) that enables such creditor to receive more than such creditor would receive if –

(A) the case were a case under Chapter 7 of this title;

(B) the transfer had not been made; and

(C) such creditor received payment of such debt

to the extent provided by the provisions of this title.

IV. Bankruptcy Code, 11 U.S.C. § 550(a) provides in –pertinent part

(a) Except as otherwise provided in this section, to the extent that a transfer is avoided under section…547… of this title, the trustee may recover, for the benefit of the estate , the property transferred, or, if the court so orders, the value of the property…

...

STATEMENT OF THE CASE

Several adversary proceedings were instituted to recover property of the bankruptcy estate. The recoveries were sought of property preferentially transferred to the petitioners. The petitioners have denied jurisdiction to collect from them under the Fleventh Amendment. Motions to dismiss were denied in Bankruptcy Court. That decision has been affirmed on appeal by the District Court and the Court of Appeals.

SUMMARY OF THE ARGUMENT

In several cases, this Court has held that the powers granted to Congress in Article I, Section 8 of the Constitution were insufficient to permit abrogation of state sovereign immunity. However, none of those cases have considered unique aspects -of the Bankruptcy power. The grant of power to establish "uniform laws on the subject of Bankruptcies" is linguistically distinct. Moreover, the power to impair contracts, a key power in the award of bankruptcy relief, has been ceded by the States in Article I, Section 10. Together, these provisions distinguish the Bankruptcy power from other powers given to Congress. These provisions support the conclusion that States ceded their immunity from suit as part of the plan of convention. If so ceded, the design of the Eleventh Amendment did not alter the original scheme to create immunity that had been ceded. Instead, the Eleventh Amendment restored the original scheme.

This Court has repeatedly found the laws in England and the colonies when the Constitution was established do not define the power given to Congress in the Bankruptcy Clause. Those laws provided only for involuntary liquidation of traders and merchants. Prior decisions of this Court have found constitutional (1) the grant of power bankruptcy relief to more persons and entities, (2) permitting relief to be voluntarily sought, and (3) allowing relief in the form of reorganization.

Prior to 1898, Congress only sporadically exercised the Bankruptcy power. Generally, Congress made no effort to grant relief to debtors against States, although, at times, State tax claims were subordinated to some other claimants in the distribution of assets. A single lower court decision from the nineteenth century where a State challenged jurisdiction because a State was a creditor upheld jurisdiction.

In the twentieth century, this Court has addressed claims of sovereignty in the bankruptcy context. On all of these occasions, this Court has held the Bankruptcy power was sufficient to interfere with a fundamental power of a sovereign State, the power to collect state taxes.

The repeated decisions that state tax collection may be altered by the Bankruptcy power suggests Congress has the ability to alter a debtor's relationship with a creditor-State. Because such a change must occur in a bankruptcy proceeding, the power to bind States in bankruptcy proceedings must also exist.

These conclusions are supported by the Framers. Hamilton's exposition of state sovereignty in tax matters in The Federalist admits of three exceptions. The Bankruptcy power qualifies for two of these exceptions. When Hamilton refers to this discussion again when discussing judicial power in The Federalist, he implies an impact on sovereign immunity as well.

There is compelling evidence of the surrender of immunity in the constitutional compact. Failure to continue to recognize that point would disrupt the current bankruptcy scheme which has been built in reliance on the prior decisions of this Court.

The Bankruptcy power is sufficiently unique that such a result would be consistent with this Court's Eleventh Amendment jurisprudence. The decision is capable of being confined to issues within the core jurisdiction of a bankruptcy court.

The *amicus curiae* ask the decision of the U.S. Court of Appeals for the Sixth Circuit be affirmed.

ARGUMENT

In 1994, in response to the decisions in Hoffman v. Connecticut Department of Income Maintenance, 492 U.S. 96 (1989) (Congress failed to clearly indicate its intention to abrogate state sovereign immunity in bankruptcy cases) and United States v. Nordic Village, Inc., 503 U.S. 30 (1992)(Congress failed to clearly indicate its intention to abrogate federal sovereign immunity), Congress enacted the current version of 11 U.S.C. § 106. See, Pub. L. No. 103-394, Sect. 113, 108 Stat. 4106, 4117 (1994). That provision specifically abrogates the sovereign immunity of all governmental entities.

Petitioners, deny Congress has the power to abrogate state sovereign immunity. They rely on Seminole Tribe of Florida v. Florida, 517 U.S. 44 (1996), which held that the powers granted to Congress in the Indian Commerce Clause did not permit abrogation of state sovereign immunity. The Court concluded that States could not be required to litigate in a federal forum without consent. The majority declared that no power granted to Congress in Article I, section 8, permitted the abrogation of Eleventh Amendment immunity.

Since the decision in Seminole Tribe, the Court has extended this holding in several cases.[2] One of those cases, Alden v. Maine, 527 U.S. 706 (1999), held that a State could not be subjected to liability for damages under a federal statute even if the suit were brought in a state court. With that holding in mind, it appears that petitioners claim the functional ability as sovereign States to opt out of the bankruptcy scheme established by Congress. They contend that Congress lacked power to create a bankruptcy system that would require a State to litigate, without its consent, in a federal bankruptcy forum. Although not articulated by

---

[2] Kimel v. Florida Bd. of Regents, 528 U.S. 62 (2000); Florida Prepaid Post-Secondary Education Expense Bd. v. College Savings Bank, 527 U.S. 627 (1999); College Savings Bank v. Florida Prepaid Post-Secondary Education Expense Bd., 527 U.S. 666 (1999); Alden v. Maine, 527 U.S. 706 (1999); and Idaho v. Couer d'Alene Tribe of Idaho, 521 U.S. 261 (1997).

the petitioners, it should be recognized that efforts to effectively adjust a debtor's relationship with a creditor-State in a state forum would be problematic for a number of reasons, including the difficulties articulated in Alden.

Petitioners assert that the necessity for an exclusive federal system of laws is an insufficient justification for abrogation of the Eleventh Amendment. They rely on College Savings Bank v. Florida Prepaid Post-Secondary Education Expense Bd., 527 U.S. 666 (1999) (trademarks) and Florida Prepaid Post-secondary Education Expense Bd. v. College Savings Bank, 527 U.S. 627 (1999) (patents). Still, there are some linguistic differences among the Patent and Commerce Clauses considered there and the Bankruptcy Clause, at issue now, that alone might make these cases distinguishable from the instant case. More significantly, however, the Constitution also prohibits any State from effectively adjusting a debtor's relationship to his creditor by impairing a contractual obligation.

Not only does Article I, Section 8, clause 4 grant Congress the power to establish "uniform laws on the subject of bankruptcies," States also cede the power in Article I, Section 10, to "pass . . . any law impairing the obligation of contracts." This is one of the fundamental characteristics of a bankruptcy law. See, Railway Labor Executives' Ass'n v. Gibbons, 455 U.S. 457 (1982) (Rhenquist, J.)

> Although we have noted that "[t]he subject of bankruptcies is incapable of

> final definition," we have previously defined "bankruptcy" as the "subject of the relations between an insolvent or nonpaying or fraudulent debtor and his creditors, extending to his and their relief." Wright v. Union Central Life Ins. Co., 304 U.S. 502, 513 -514 (1938). See Continental Illinois National Bank & Trust Co. v. Chicago, R. I. & P. R. Co., 294 U.S. 648, 673 (1935). Congress' power under the Bankruptcy Clause "contemplate[s] an adjustment of a failing debtor's obligations." Ibid. This power "extends to all cases where the law causes to be distributed, the property of the debtor among his creditors. "Hanover National Bank v. Moyses, 186 U.S. 181, 186 (1902). It "includes the power to discharge the debtor from his contracts and legal liabilities, as well as to distribute his property. The grant to Congress involves the power to impair the obligation of contracts, and this the States were forbidden to do." Id., at 188.

Id. at 466.

Clearly, in giving the bankruptcy power to the federal government, States ceded some portion of the

sovereignty that had been theirs.[3] The Eleventh Amendment was not intended to change the original understanding of the Constitution. Rather, it restored the widespread understanding of the Constitution prior to the decision in Chisolm v. Georgia, 2 U.S. (2

[3] "Prior to the drafting of the Constitution, at least four States followed the practice of passing private Acts to relieve individual debtors. Given the sovereign status of the States, questions were raised as to whether one State had to recognize the relief given to a debtor by another State. Uniformity among state debtor insolvency laws was an impossibility and the practice of passing private bankruptcy laws was subject to abuse if the legislators were less than honest. Thus, it is not surprising that the Bankruptcy Clause was introduced during discussion of the Full Faith and Credit Clause. The Framers sought to provide Congress with the power to enact uniform laws on the subject enforceable among the States. Similarly, the Bankruptcy Clause's uniformity requirement was drafted in order to prohibit Congress from enacting private bankruptcy laws. The States' practice of enacting private bills had rendered uniformity impossible." Gibbons, at 473. (Citations omitted.)

Dall) 419 (1793). See e.g., Alden.[4] With that, the idea that the Amendment restored the original understanding, the question is what was ceded by the States in the original constitutional scheme. Did the Framers contemplate Congress could require the States to come to a federal bankruptcy forum, and be bound by rulings made there when States were creditors?

This is a particularly challenging inquiry for several reasons. The origin and purpose of the Bankruptcy Clause was meagerly discussed by the Framers. Reliance on pre-existing law is of limited usefulness. The meaning of the Bankruptcy Clause has repeatedly been held to have been independent of the kinds of laws in existence in England or the colonies at

[4] The text and history of the Eleventh Amendment also suggest that Congress acted not to change but to restore the original constitutional design. . . . By its terms, then, the Eleventh Amendment did not redefine the federal judicial power but instead overruled the Court. . . . Given the outraged reaction to *Chisholm*, as well as Congress' repeated refusal to otherwise qualify the text of the Amendment, it is doubtful that if Congress meant to write a new immunity into the Constitution it would have limited that immunity to the narrow text of the Eleventh Amendment. . . . The more natural inference is that the Constitution was understood, in light of its history and structure, to preserve the States' traditional immunity from private suits. As the Amendment clarified the only provisions of the Constitution that anyone had suggested might support a contrary understanding, there was no reason to draft with a broader brush. Alden at 722-24.

the time of the adoption of the Constitution.[5] Hanover Bank v. Moyses, 186 U.S. 181, 186-87(1902); Continental Illinois National Bank and Trust Co. v. Chicago, Rock Island and Pacific Railway, Co., 294 U.S. 648, 668-69 (1934); and Adair v. Bank of America National Trust and Savings Association, 303 U.S. 350 (1938). Rather, this Court has said this power is incapable of final definition and is subject to extensive legislative discretion, Sturges v. Crowninshield, 12 U.S. (4 Wheat.) 122 (1819); Moyses, supra; Continental Illinois, supra; Wright v. Union Central Life Insurance Co., 304 U.S. 502 (1938); Blanchette v. Connecticut General Insurance Corps., 419 U.S. 102 (1974); and, Gibbons, supra. This Court has described this clause as concerning the power to discharge debts and to distribute property, Moyses; a person's general inability to pay his debts, Continental Illinois; and the relations between an insolvent and his creditors, Wright.

Also contributing to the difficulty was the lack of a permanent bankruptcy law during most of the nineteenth century. A permanent bankruptcy law has existed only since 1898. Prior to that time, bankruptcy laws were in effect only from1800 to 1803, from 1841 to 1843, and from 1867 to 1878. Consequently, there have been only limited opportunities to delineate the proper intersection of the broad grant of authority in the Bankruptcy Clause with principles of sovereign immunity.

---

[5] Such laws were limited to traders and merchants. Voluntary bankruptcy was not known. Continental Illinois, infra at 668. Compositions and reorganizations were not part of those early practices. Adair infra at 354.

Only one cryptic lower court decision from the nineteenth century appears to address the problem at all. In In re: Greenville & C.R. Co., 10 F.Cas. 1180 (D.C. S.C. 1872)(No. 5,787). (Decided under the Bankruptcy Act of 1867), the Court held, "Whatever the lien or interest the state may have in or upon the property of [a debtor] the jurisdiction of the bankruptcy court is not ousted because the state is a creditor." This case seems to have arisen after the State of South Carolina had initiated an action in state court as a guarantor of railroad bonds to have the railroad liquidated and all creditors paid. See additional discussion of the course of this litigation in Parsons v. Greenville & C.R. Co., 18 F.Cas. 1255 (C.C.A. E.D. S.C. 1877) (No. 10,776). The decision that jurisdiction could be exercised, even though the State was a creditor, can only lead to the inference that a sovereign immunity claim was made and rebuffed.

In the twentieth century, cases from this Court suggest that States lack the power as sovereign entities to defeat application of the bankruptcy scheme established by Congress. In New Jersey v. Anderson, 203 U.S. 483 (1906) this Court held that whether a debtor's obligation to a State was a tax obligation entitled to priority as a tax under the Bankruptcy Act was a question of federal, not state, law. The Court continued that the meaning of the Bankruptcy Act could not be altered by any expression of a State legislature.

In Van Huffel v. Harkelrode, 284 U.S. 225 (1931) this Court considered whether a bankruptcy court could order the sale of property, to which a state tax

lien had attached, free and clear of all liens, with the liens attaching to the proceeds. The State had resisted because such a sale could result in extinguishing the state lien without full payment of the state tax. Under prior practice, the purchaser had to satisfy such state tax liens in full. See Black, H.C., A Treatise on the Law and Practice of Bankruptcy, (4th Ed. Kansas City, Mo. 1926) at page 820. Nonetheless, this Court held that bankruptcy power was sufficient to permit such interference with a state tax lien.

In New York v. Irving Trust Co., 288 U.S. 329 (1933), the efficacy of an order setting a final date for filing tax claims was at issue. After the order had been served on New York, the State filed a claim that was tardy under the terms of the order. Despite being tardy, New York argued that such limits could not be imposed on a sovereign State. This Court upheld the validity of the procedural order and denied the claim.

Irving Trust is particularly significant for Eleventh Amendment purposes. Prior to establishing a bar date for tax claims, New York had not appeared in the bankruptcy case. When it tardily appeared, New York claimed a sovereign right to be paid on its tax claim before other creditors per the rule of Marshall v. New York, 254 U.S. 380 (1920). New York was rebuffed. Irving Trust at 331. Even though New York had not appeared, state sovereignty yielded to the order of the bankruptcy court. If New York had Eleventh Amendment immunity, how could that order have become effective on a non-appearing sovereign entity? Yet, a unanimous Court held the order was binding. Ergo, New York lacked such immunity.

In Gardner v. New Jersey, 329 U.S. 565 (1945), the Court held that a trustee's petition to adjudicate New Jersey's tax claims could be heard over the objection that "the petition would constitute a prohibited suit against the state." Id. at 571. The Court reasoned that by filing a proof of claim, New Jersey had submitted to an adjudication of the validity and priority of its claims. Relying on waiver principles, no prohibited suit against a State was found to exist.

The Court also concluded all property of a debtor and not merely the equity in the property was found subject to jurisdiction of the bankruptcy court.[6] The portion of property on which New Jersey claimed a lien was subject to bankruptcy court jurisdiction in reliance on Van Huffel, supra, and Irving Trust, supra. This holding does not depend on New Jersey having filed a claim. The validity of the lien of the State was subject to adjudication whether the State appeared or not. Sovereign immunity from suit would not protect property in which a State claimed a lien if the State failed to appear. How could such a judgement be made against a non-appearing party, if by not appearing the party would have remained immune? One can only conclude again that there was no immunity.

---

[6] This outcome is consistent with California v. Deep Sea Research, Inc., 523 U.S. 491 (1998), which found the Eleventh Amendment inapplicable to the exercise of admiralty jurisdiction where a state does not possess the res. The current Bankruptcy Code, 11 U.S.C. § 543, gives power to bankruptcy courts to require turnover of property from a receiver appointed by a state court. See In re: 245 Associates, L.L.C., 188 B.R. 743 (Bank. S.D. N.Y. 1995).

In City of New York v. Saper, 336 U.S. 328 (1949) this Court considered whether another change in the bankruptcy law was effective. Under prior practice federal, state and municipal authorities were entitled to be paid post-petition interest on tax claims through the date of payment. Statutory revisions eliminated interest after filing. This caused monies that would have been paid to governmental entities for post-petition interest to be paid to others. Without dissent, this Court held Congress had the power to eliminate post-petition interest on *inter alia* state taxes and Congress had purposely done so.

More recently Perez v. Campbell, 402 U.S. 637 (1971) invalidated a state statute denying a person a license to drive for non-payment of a debt discharged in bankruptcy. The Court held such a statute interfered with debtors obtaining a fresh start. The Supremacy Clause was the specific provision relied upon by the Court.

Clearly, Congress has the power under the Bankruptcy Clause to supercede state law. More significantly Congress has the power to adjust the relationship of a debtor to a State-creditor even where the State-creditor does not appear. Congress can even do so by limiting the most fundamental aspect of sovereignty, the power to impose and collect taxes. Anderson, Van Huffell, Irving Trust, Saper and

Gardner, all limit sovereignty[7] in the collection of state taxes.[8] Such a power unmistakably has the potential to impact state treasuries.

In Tennessee Student Assistance Corp. v. Hood, 541 U.S. 509 (2004), the Court upheld the power of the Bankruptcy Courts to discharge debts owed to States.

Although Anderson, Van Huffel, Irving Trust, Gardner, Saper, and Hood did not rely upon any part of The Federalist for support, support exists. In The Federalist, No. 32, Hamilton began by stating the general principle of sovereignty as including an uncontrollable authority to raise revenue. He wrote:

> Although I am of opinion that there would be not real danger of the consequences which seem to be

---

[7] A note in the majority opinion in Seminole Tribe provides; "It has not been widely thought that the federal antitrust, bankruptcy or copyright statutes have abrogated the States' sovereign immunity. This Court has never awarded relief against a State under any of those statutory schemes. . . ." Id. at 72 n.16. These cases, relied upon here, were not under discussion at that time, and may have been overlooked.

[8] Today, 11 U.S.C. § 507(a)(8) defines which taxes are entitled to priority status. Taxes in this category are exempt from discharge per 11 U.S.C. § 523. Taxes not within this category (income taxes more than 3 years old, for example) may be discharged in a Chapter 7 case whether or not a proof of claim is filed, 11 U.S.C. § 727(a) and (b). A Chapter 13 plan needs to provide for full payment only of priority taxes 11 U.S.C. § 1322(a)(2). Upon completion of such a plan, the debtor obtains a discharge of all debts not required to be paid by the plan. 11 U.S.C. § 1328. This can operate to discharge non-priority taxes.

apprehended State governments from a power in the Union to control them in the levies of money,. . .I am willing here to allow, in its full extent, the justness of the reasoning which requires that the individual States should possess an independent and uncontrollable authority to raise their own revenues for the supply of their own wants. And making this concession, I affirm that (with the sole exception of duties on imports and exports) they would, under the plan of the convention retain that authority in the most absolute and unqualified sense; and that an attempt on the part of the national government to abridge them in the exercise of it, would be a violent assumption of power, unwarranted by any article or clause of its Constitution. . . .

This broad statement was then modified in three particulars:

> But as the plan of the convention aims only at a partial union or consolidation, the State governments would clearly retain all the rights of sovereignty which they before had, and which were not, by that act, exclusively delegated to the United States. This exclusive delegation, or rather this alienation, of State sovereignty, would only exist in three cases: where the Constitution in express

terms granted an exclusive authority to the Union; where it granted in one instance an authority to the Union, and in another prohibited the States from exercising the like authority; and where it granted an authority to the Union, to which a similar authority in the States would be absolutely and totally *contradictory and repugnant*...

These three cases of exclusive jurisdiction in the federal government may be exemplified by the following instances: The last clause but one in the eighth section of the first article provides expressly that Congress shall exercise *"exclusive legislation"* over the district to be appropriated as the seat of government. This answers to the first case. The first clause of the same section empowers Congress *"to lay and collect taxes, duties, imposts, and excises"*; and the second clause of the tenth section of the same article declares that, *"no State shall,* without the consent of Congress, *lay any imposts or duties on imports or exports,* except for the purpose of executing its inspection laws." Hence would result an exclusive power in the Union to lay duties on imports and exports, with the particular exception mentioned; but this power is abridged by another clause, which declares that no tax or duty shall be laid on articles exported from any

> State; in consequence of which qualification, it now only extends to the *duties on imports*. This answers to the second case. The third will be found in that clause which declares that Congress shall have power "to establish an UNIFORM RULE of naturalization throughout the United States." This must necessarily be exclusive; because if each State had power to prescribe a DISTINCT RULE, there could not be a UNIFORM RULE. . . .

The Federalist No. 32.

The Bankruptcy power probably meets two of these criteria. The Bankruptcy Clause shares a uniformity requirement with the Naturalization Clause. The Bankruptcy power also meets the conditions of the second case. Power is given to Congress to enact bankruptcy provisions in Article I, Section 8, clause 4. As has been discussed, the power to impair contracts is an essential component of this power. Gibbons, supra. The States clearly cede that power in Article I, Section 10. The constitutional scheme for bankruptcy meets two of the independent criteria for finding an exception to state sovereignty. State sovereignty over taxation would yield to the exercise of the bankruptcy power by Congress.

Examination of the first bankruptcy law is of limited assistance in this inquiry into the intent of the Framers. The first Act provided in section 62, that "nothing contained in this law shall, in any manner, . . .

to lessen or impair any right to . . . money due the United States or to any of them. See Act of April 4, 1800, Ch. XIX, 2 Stat. 19, 36 (1800) repealed by Act of Dec. 19, 1803 Ch. 6, 2 Stat. 248. Some would say this was a recognition by the earliest Congress that it could not impair debts owed to states. But the language also supports the conclusion that although Congress recognized it had the power to affect the relationship between debtors and State-creditors, it chose not to.

During the nineteenth century, Congress did impair State tax collection by limiting the priority of claims made by states in the distribution scheme. In Section 5 of the Act of August 19, 1841, Ch. IX, 5 Stat. 440, 444-46, repealed by Act of March 3, 1843, Ch. 82 5 Stat. 614. Congress prioritized the distribution scheme by placing the United States, persons entitled to preference under other laws of the United States, and wage-earners in a position to obtain funds from the liquidating official, an assignee, before payments to any other creditor. The States received no priority of distribution superior to unsecured creditors. In Section 27 of the Act of March 2 1867,Ch. 176, 14 Stat. 517, 530-31, repealed by Act of June 7, 1878, C. 160, 20 Stat. 99, debts, taxes and assessments due to the State in which the proceedings were pending were given a third priority of distribution, although the statute elsewhere provided that no interference with federal or states collection was to occur. In In re: Ambler, 1 F.Cas. 588 (D.C. S.D.N.Y. 1875)(No. 270) the Court held that Texas was not entitled to a priority distribution under the third priority in proceedings pending in New York. The claim of Texas was instead placed on a par with unsecured creditors. Although it is difficult to infer

much from this legislation about the early views of Congress concerning its power, there is some modest subordination of state taxes, and consequently interference with state sovereignty.

During the twentieth century, the Nation first enjoyed permanent bankruptcy legislation. Cases considering the intersection of the Bankruptcy power and state sovereign immunity began to reach this Court. On five specific occasions, Anderson, Van Huffel, Irving Trust, Gardner and Saper, this Court has found the Bankruptcy power sufficient to affect the fundamental power of a sovereign State to collect taxes. Although limited, The Federalist No. 32 recognizes that state sovereignty yields to the Bankruptcy power. Although very limited bankruptcy legislation existed during the nineteenth century, that power, at times, impacted the distribution of a bankrupts' property in payment of state taxes. Although sparse, lower court opinions from that era support the validity of such encroachments and no cases deny the validity of such power. Such a record is the "compelling evidence" of a feature "inherent in the constitutional compact." Alden supra at 741. Blatchford v. Native Village of Noatak, 501 U.S. 775 (1991).

This brief has so far analyzed The Federalist, No. 32, in Hamilton's original context, interference with the sovereign power of taxation. The Bankruptcy power appears sufficient to support such interference. Admittedly, not being sued is an attribute of sovereignty distinct from the collection of taxes. Still, in discussing the judicial power in The Federalist, No. 81, Hamilton wrote:

> The circumstances which are necessary to produce an alienation of State sovereignty were discussed in the article of taxation, and need not be repeated here.

Hamilton's perception that further discussion of sovereignty was unnecessary suggests he saw no distinction between a state's sovereignty and its sovereign immunity from suit. If one such factor stands, so does the other: if one fails, so does the other. The United States Court of Appeals for the Sixth Circuit, found the plan of convention contained the cession of state sovereign immunity where necessary to effect a scheme designed by Congress under the Bankruptcy Clause.

The ability of Congress to discharge a bankrupt's debt to a State for taxes is clear and is more clear since the decision in Hood. The only notice necessary to achieve said relief for non-priority debts is the notice that a debtor has filed for relief.[9] If that can be done, then why cannot Congress require turnover of property of the estate to pay superior claims, such as wages, alimony and child support and to treat state, local and federal taxes on equal footing.[10]

---

[9] Such notice was found sufficient notice to creditors in Moyses, supra.

[10] A preference exists only where a creditor has received more in advance of bankruptcy than it can in bankruptcy 11 U.S.C. § 547(b)(5). This rule promotes equality of treatment among unsecured creditors, and payment of recognized priorities for wages; 11 U.S.C. § 507(a)(3) child support; 11 U.S.C. § 507(a)(5); and, taxes 11 U.S.C. § 507(a)(8). To name a few.

This analysis actually unmasks the claim that this is a case to resolve Eleventh Amendment immunity. It is actually an effort by States to opt out of the bankruptcy scheme altogether. Cases and commentators have described numerous difficulties which would occur if the Eleventh Amendment provides an opportunity for States to opt out of the bankruptcy system. See McVey Trucking, Inc. v. Sec'y of State of Illinois (In re: McVey Trucking, Inc.), 812 F2d 311, 328 (1987) (problems of making a state a preferred creditor). See e.g., Lieb, R., Eleventh Amendment Immunity of a State in Bankruptcy Cases: A New Jurisdictional Approach, 7 Am. Bank. Inst. L.Rev. 269, 279-282(1999); Klee, K. N., Johnston, J. O., Winston, E., State Defiance of Bankruptcy Law, 52 Vanderbilt L.Rev. 1527 (1999); and, Browning, M., Tough Bankruptcy Issues Under the Eleventh Amendment, 7 J. of Bankruptcy Law and Practice 219 (1998). Current law would need to be rewritten at length.

Petitioners seek to undo a century of decisions upon which Congress has built the current bankruptcy

scheme. This would create chaos. This effort should be rejected.

Instead, this Court should find that the uniqueness of the Bankruptcy Clause, in conjunction with the Contract Clause limitation on the States, as well as the historical vision of the Framers, and the prior decisions of this Court all support abrogation of state sovereign immunity in the bankruptcy context.

This result does not require re-analysis of the logic of Seminole Tribe. Nor does it open a proverbial "Pandora's box." Congress cannot use the Bankruptcy power to enact non-bankruptcy laws, just as it could not create Article III jurisdiction in the bankruptcy courts.[11] In Gibbons, now Chief Justice Rhenquist found no difficulty in distinguishing the Bankruptcy power from the power granted Congress in the Commerce Clause. He specifically concluded that power under the Commerce Clause could not be substituted for the Bankruptcy power to evade the uniformity requirements of the Bankruptcy power. This holding is contradicted only by the dicta of a dissent. See Hoffman v. Connecticut Department of Maintenance, 492 U.S. 96, 106 (1989)(Marshal, J. dissenting) (no distinction between the Commerce Clause and the Bankruptcy Clause). The power, and the logic, of Gibbons should be recognized as superior.

---

[11] In the wake of Northern Pipeline Const. Co. v. Marathon Pipe Line Co., 458 U.S. 50 (1982) Congress enacted distinctions between core and non-core bankruptcy jurisdiction. 28 U.S.C. § 157(b)(2)(3) and (4). Such distinctions must be plead in the complaint filed in an adversary proceeding. Bankruptcy Rule of Procedure 7008(a).

Congress has repeatedly been held to have the power to enact legislation that changes the relationship between debtors and creditor-States, and so impact State treasuries. Congress has the power to require States to follow established procedures when States participate in bankruptcy proceedings. Congress has the power to establish standards for adjudicating the priority to be afforded State claims. Petitioners' effort to avoid abrogation of its sovereign immunity must be evaluated in this historical context. When this analysis is performed, only one conclusion remains that the Eleventh Amendment is inapplicable in the bankruptcy context.

CONCLUSION

WHEREFORE the *amicus curiae* ask that the decision of the United States Court of Appeals for the Sixth Circuit be affirmed.

RESPECTFULLY SUBMITTED,

Martin P. Sheehan
Counsel of Record
41 Fifteenth Street
Wheeling, West Virginia 26003
(304) 232-1064

Counsel for Amicus Curiae
National Association of
Bankruptcy Trustees